BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3285 of 2022
Complaint filed on : 27.06.2022
Date of decision : 09.07.2024

1. Neetu Varshney **2. Kailash Chandra Varshney** R/o: House no. 96, flat no.96, Flat no. A-2, First Floor, Eco Apartment, KH No. 619/21, Chattarpur, South Delhi	**Complainants**
Versus	
Venetian LDF Projects LLP Regd. Office: 205, Time Centre, Golf Course Road, Sector-54, Gurugram, Haryana-122002. Corporate Office: 83, Avenue Sector – 83 Avenue, Gurugram, Haryana-122004.	**Respondent**

CORAM:

Shri Arun Kumar — **Chairman**
Shri Vijay Kumar Goyal — **Member**
Shri S.K. Arora — **Member**

Appearance:

Ms. Sapna Malik, Advocate — Complainants
Shri Harshit Batra, Advocate — Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 [in short, the Act) read with rule 28 of the Haryana Real Estate [Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4J(al of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions

under the provisions of the Act or the Rules and regulations made thereunder or to the allottees as per the agreement for sale executed inter se.

A. Unit and Project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.no.	Particulars	Details
1.	Name of the project	"83 AVENUE", Sector-83, Gurgaon.
	Nature of the project	Commercial
	Area of the project	2.3625 acres
2.	DTCP license no.	122 of 2008 dated 14.06.2008
	Valid up to	13.06.2016
3.	HRERA registered or not	Registered Vide no.310/42 of 2019 dated 16.01.2019 Valid upto 30.09.2020
4.	Application Form	01.10.2013 [Page 42 of complaint]
5.	Allotment letter dated	11.11.2015 [Page 42 of complaint]
6.	Unit no.	F-118, [Page 48 of complaint]
7.	Unit area	area admeasuring 395.19 sq. ft. (super area)

		The said area was revised to 341.04 sq. ft. as per mail dated 01.04.2022 at page 81 of complaint. [Page 48 of complaint]
8.	MoU	12.12.2013 [Page 24 of complaint]
9.	Assured Return clause	*3. Assured Return* *3.1 Till 18 months from the date of this MoU, the developer, shall pay to the allottee an assured return at the rate of Rs.555.45/- pe sq. ft. of super area of premises per month and after payment premises per month and after payment of balance premium as per schedule 1 till the notice of offer of possession is issued, the developer shall pay on assured return of Rs.104.20/- per sq. ft. of super area (Rupees One Hundred Four and Paisa Twenty Only) pe sq. ft. of super area of premises per month (hereinafter referred to as the 'Assured return')* [Page 31 of complaint]
10.	Date of space buyer's agreement	20.04.2016 [Page 45 of complaint]
11.	**Possession clause**	*38.* *The developer contemplates to offer possession of said unit to allottees within 36 months of signing of this agreement or within 36 months from the date of start of construction of said building whichever is later with the grace period of 3 months subject to force majeure events.*
12.	Date of start of construction	Not provided
13.	Due date of Possession	20.07.2019

		[36 months from the date of agreement as date of start of construction is not available + 3 months of grace period)
14.	Sale consideration	Rs.38,67,428/- [Page 48 of complaint]
15.	Amount paid by the complainants	Rs.40,09,877/- [Page 52 of complaint]
16.	Amount of assured return paid by the respondent	Rs.5,04,360 /- *to both the complainants each* From 12.12.2013 to 30.11.2016 [Page 37 & 38 of reply]
17.	Occupation certificate	Not obtained
18.	Offer of possession	Not offered

B. Facts of the complaint

4. The complainants have made the following submissions in the complaint: -

i. That on 01.10.2013, the complainants made an application for booking of commercial unit in the project of the respondent by paying a sum of Rs.4,00,000/ vide cheque bearing no.764327 dated 30.09.2013. In this regard, the respondent issued receipt no.000243 dated 01.10.2013.

ii. That the complainants made further payment of Rs.2,00,000/- and Rs.15,32,896/ to the respondent through cheque. Acknowledging the same, respondent issued the receipt no's.000298 and 000297 dated 06.10.2013 and 10.12.2013 respectively.

iii. That after receiving the aforesaid payments from the complainants, on 12.12.2013 the memorandum of understanding (MoU) was executed between the parties hereby, the respondent allotted the unit no. F-116 on

first floor, admeasuring 395.19 sq. ft. (approx) super area in favour the complainants. Further, as per the aforesaid MoU, the total consideration for allotment of the unit is Rs.38,67,428/- works out at a sale price of Rs.9,786/- per sq. ft. which includes EDC/IDC @ Rs.670/- per sq. ft.. Thus, a total amount of Rs.21,32,896/- was paid towards the aforesaid allotment, which was more than 50% of the total sale price for the aforesaid unit. As per schedule-1 of payment plan of the aforesaid MoU, the complainants was directed to pay the remaining amount of Rs.18,01,325/- towards the agreed sales consideration on or before 18 months from the date of the aforesaid MoU plus service tax and on offer of possession IFMS @150/- per sq.ft, plus power back up charges @ Rs.150/- per sq.ft. and stamp duty, registration and other charges as applicable. Further, as per article 3.1 of the aforesaid MoU, till 18 months from the date of MoU, the respondent shall pay to the complainants an assured return at the rate of Rs.55.45/- per sq. ft. of super area of premises per month and after payment of balance as per schedule-1 till the notice for offer of possession is issued, the respondent shall pay to the complainants an assured return at the rate of Rs.104.20/- per sq. ft. of super area of premises per month.

iv. That the respondent had unilaterally revised/changed the unit number from F-116 to F-118 without consulting the complainant for the same. After changing the unit number, the respondent issued vide letter dated 13.05.2015 and 01.06.2015 to the complainants by requesting them to confirm the new unit no. F-118 with all other terms and conditions of the signed MoU dated 12.12.2013.

v. That even after taking more than 50% of total sale consideration, the respondent did not sign the space buyer's agreement (SBA), despite the

complainants' various visits to the respondent's office. The complainants were forced to make the remaining payment of Rs.18,76,980/-. In this regard, the respondent further issued vide letter dated 01.06.2015 to the complainants for intimation of due installment of Rs.18,76,980/- for unit no.F-118, 83 Avenue, sector-83, Gurugram.

vi. That, the complainant made the payment of Rs.40,09,877/- to the respondent for the aforesaid unit, which was more than 100% of the total consideration of the aforesaid unit. Therefore, the complainant made all the payment on time without any default for the same and after 23 months from the date of MoU, respondent issued letter dated 11.11.2015 for allotment of commercial unit no.F-118 in 83 Avenue, sector-83, revenue estate of village-Sihi, Tehsil-Manesar, District Gurugram, Haryana and finally space buyer's agreement was signed and executed between the parties on 20.04.2016. Hence, the act of the respondent violated the section 13 of the RERA, 2016. Respondent never mentioned such form as prescribed and specify in the aforesaid space buyer's agreement as per Section 13(2] of the RERA, 2016

vii. That as per clause 38 of the space buyer's agreement, the respondent agreed to issue the offer possession of the said unit to the complainants within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later with a grace period of three months. Hence, the possession of the unit was due on 20.04.2019 and there is a delay of 37 months 10 days in handing over the possession as on 31.05.2022.

viii. That as per the clause 3 of MoU, till the notice of offer of possession is issued the respondent shall pay to the complainants an assured return at the rate of Rs.104.20/- per square feet of super area of promises per

month i.e., Rs.41,178.798/- per month to the complainant. This amount shall be payable on or before the 7th day of every calendar month on a due basis. However, after February 2017, complainants visited several times to the office of respondent for assured return cheques of February 2017, but the respondent always assured the complainants that the respondent will issue cheques of assured return within one month, but the respondent have not issued any cheque of assured return to the complainant after January, 2017. Hence, the respondent is bound to pay the assured return to the complainant from February, 2017 till the date of offer of possession. In this regard, the complainants attached the bank statement of Yes bank statement from 12.12.2013 to 01.04.2022 in the present complaint.

ix. That the complainants also filed a police complaint against the respondent and its directors for cheating and criminal conspiracy in the month of March, 2018.

x. That after receiving, the more than 100% of the total consideration, the respondent recently issued an email dated 01.04.2022 to the complainants, "hereby, the respondent stated that the final super area of complainants' unit no. F-118, first floor is 341.09 sq. ft. and the carpet area is 170.55 sq. ft. The final adjustment of the unit price based on the actual area will be done at the time of possession. As such, the super area of the aforesaid unit is reduced from 395.19 sq. ft. to 341.09 sq. ft. with a malafide intention to grab hard earned money of the complainants. Moreover, the respondent informed that the carpet area of the aforesaid unit is 170.55 sq. ft, which is excessive overloading and quite high of 50% of the super area, but in the MoU and space buyer's agreement never mentioned about the carpet area of the aforesaid unit. Hence, the same

was done by the respondent unilaterally without consent of the complainants and without mentioning the same in the MoU and space buyer's agreement of the aforesaid unit. Therefore, the act of the respondent is violated and breached the terms and conditions of the aforesaid MoU and Space buyer's agreement of the unit. Therefore, the respondent is liable to give another unit on the same sq. ft. i.e. 395.19 sq. ft. to the complainants without excessive overloading of the carpet area of the aforesaid unit, in case the respondent reduced the aforesaid unit no.118 from 395.19 sq. ft. to 341.09 sq. ft.

xi. That the complainants have invested their hard-earned money in this project but from February, 2017, the complainants neither received any assured return payment/cheque nor offer of possession of the aforesaid unit from the respondent till today, which is creating a huge loss to the complainants and the same cannot be compensated in any manner. Hence, the respondent violated the terms and conditions of the memorandum of understanding dated 12.12.2013.

xii. That the act and conduct of the respondent shows that they had only one intention to grab a handsome amount from the complainant by making false grounds by using unfair trade practices, which shows the deficiency in service on the part of the respondent. It is quite apparently clear that respondent has a dishonest, malafide and mischievous intention not to pay the assured return to the complainants and to obtain wrongful gain and causing wrongful loss to the complainants. Further, due to the malpractices of the respondent, now the super area of the aforesaid unit, is reduced from 395.19 sq. ft. to 341.09 sq. ft. to grab hard earned money of the complainants and the same is the act of the respondent is violated and breached the terms and conditions of the aforesaid MoU and space

buyer's agreement. As a result, the complainants suffered greatly on account of mental & physical agony, harassment and litigation charges. Thus, due to such hardship faced by the complainants by the act and misconduct of the respondent, the complainants are exercising their right to file and pursue a case for their justice before this Hon'ble Authority.

xiii. That the complainants reserve their right to file a complaint before the Hon'ble Adjudicating Officer, RERA, Gurugram, for the compensation of mental harassment, torture, agony and other compensation etc. Hence, the complainants prays this Authority kindly gives liberty to complainants for the same.

C. Relief sought by the complainants:

5. The complainants have sought following relief(s)

I. Direct the respondent to give another unit on the same sq. ft. i.e. 395.19 sq. ft. to the complainants without excessive overloading of the carpet area of the aforesaid unit, in case the respondent reduced the aforesaid unit no.118 from 395.19 sq. ft. to 341.09 sq. ft.

II. Direct the respondent to pay the assured return of Rs.41,178/- per month after deducting TDS of Rs.4,117/- i.e. balance Rs.37,061/- on amount paid to the complainants from February, 2017 to till the offer of the possession of the unit with interest for every month of delay at prevailing rate of interest on the unpaid amount

III. Direct the respondent to handover the possession of the aforesaid unit to the complainants within 3 months.

IV. Direct the respondent to pay delay possession charges Interest for every month of delay at prevailing rate of interest from the due date

of possession i.e. 20.04.2019 till the date of actual handing over of complete and valid physical possession of the unit.

V. To direct the respondent to pay litigation cost.

6. On the date of hearing, the authority explained to the respondent /promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent:

7. The respondent contested the complaint on the following grounds:

i. That all the averments, submissions, and contentions made by the complainants in the complaint are denied unless specifically admitted to hereunder. That the complainants have no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the memorandum of understanding dated 12.12.2013, and the space buyer's agreement dated 20.04.2016. That the complainants are estopped by their own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint.

ii. That the complainants herein being interested in the real estate development of the respondent, under the name and style "83 Avenue", situated in Village Sihi, Gurgaon, (herein referred to as 'Project'), approached the respondent to know the details of the project and expressed their willingness to invest in the said project.

iii. That after having made all the due inquiries about the said project, the complainants voluntarily and willingly invested into the project of the

respondent and booked a unit into the project of the respondent. Thereafter, a unit bearing no. F-116, having a tentative super area of 395.19 sq. ft. (approx.) ("old unit") was provisionally allotted to the complainants vide Memorandum of Understanding dated 12.12.2013.

iv. That on 13.05.2014, the respondent sent a letter to the complainants informing them that provisional allotment of the old unit of the complainants has undergone a change and a unit bearing no. F-118, first floor, admeasuring 395.19 sq. ft super area ("new unit"), has been allotted to them. The respondent with due *bonafide* conduct asked the complainants to confirm this revised allotment of unit and sign the letter within 15 days of the receipt, failing which the unit shall be treated as accepted by the complainants. On receiving no reply from the complainants, the respondent again a letter dated 01.06.2015, asking the complainants to confirm this revision of their unit. Thereafter, unit no. F-118 with the tentative super area of 395.19 sq. ft. was provisionally allotted to the complainants vide allotment letter dated 11.11.2015. That it needs to be categorically noted that the said allotment letter mentioned that the allotment has been "provisionally identified".

v. That thereafter, the space buyer's agreement with respect to the new unit was executed between the parties. That the relationship between the parties is contractual in nature and is governed by the agreement, the contents of which were willingly, voluntarily, and categorically accepted between the parties. The rights and obligations of the parties flow directly

from the agreement. At the outset, it must be noted that the complainants willingly and voluntarily entered into all and every agreement after reading and understanding the contents thereof.

vi. That clause 83 of the agreement needs to be categorically noted, which is reproduced as under:

> *83. That this Agreement which has been titled as "Space Buyer's Agreement" constitutes the entire Agreement between the parties and revokes and supersedes all previous discussions/correspondence, application and Agreement between the parties, if any, concerning the matters covered herein whether written, oral or implied. This Agreement shall not be changed or modified except by written amendments duly agreed by the parties. The terms and conditions and various provisions embodied in this Agreement shall be incorporated in the sale deed and shall form part thereof.*

That in terms of the same, it needs to be noted that in the presence of the above-mentioned entire agreement clause, the agreement supersedes the MoU in its entirety.

vii. That the parties had the intention of establishing their rights and obligations as per the new contract space buyer's agreement, which deals with all the aspects of contractual relationship between the parties in toto. It categorically superseded the MoU. It is a settled principle of law that upon novation involving substitution of an old contract with a new contract, the obligation of the old contract stands dissolved and are completely dealt with by the new contract.

viii. Delay in project due to reason beyond the control of the respondent:

- That the respondent was adversely affected by various construction bans, lack of availability of building material, regulation of the construction and development activities by the judicial authorities including NGT in NCR on

account of the environmental conditions, restrictions on usage of ground water by the High Court of Punjab & Haryana, demonetization, adverse effects of covid etc. and other force majeure circumstances. It needs to be categorically noted that the construction activities were stopped on various occasions during the tenure of the construction of the project.

- In past few years, construction activities have also been hit by repeated bans by the Courts/Tribunals/Authorities to curb pollution in Delhi-NCR Region. In the recent past the Environmental Pollution (Prevention and Control) Authority, NCR (EPCAI vide its notification bearing no. EPCAR/2019/L-49 dated 25.10.2019 banned construction activity in NCR during night hours [6 p.m. to 5 a.m.] from 26.70.2019 to 30.10.2019 which was later on converted to complete ban from 1.11.2019 to 05.11.2019 by EPCA vide its notification bearing no. R/20L9/L-53 dated 01.11.2019.
- The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029 /1985 titled as "MC Mehta vs. Union of India" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated l4.02.2020. These bans forced the migrant labourers to return to their native towns/states/villages creating an acute shortage of labourers in the NCR Region.
- Even before the normalcy could resume, the world was hit by the Covid-19 pandemic. Therefore, it is safely concluded that the said delay in the

seamless execution of the project was due to genuine force majeure circumstances and the said period shall not be added while computing the delay. That the current covid-19 pandemic resulted in serious challenges to the project with no available labourers, contractors etc. for the construction of the Project. The Ministry of Home Affairs, GOI vide notification dated March 24, 2020 bearing no. 40-3l202 0-DM-t(A) recognised that lndia was threatened with the spread of Covid-19 pandemic and ordered a completed lockdown in the entire country for an initial period of 27 days which started on March 25, 2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the same continues in some or the other form to curb the pandemic. Various state governments, including the Government of Haryana have also enforced various strict measures to prevent the pandemic including imposing curfew, lockdown, stopping all commercial activities, stopping all construction activities. Pursuant to the issuance of advisory by the GOI vide office memorandum dated May 13, 2020 regarding extension of registrations of real estate projects under the provisions of the RERA Act, 2016 due to "Force Majeure", the Haryana Real Estate Regulatory Authority has also extended the registration and completion date by 6 months for all real estate projects whose registration or completion date expired and or was supposed to expire on or after March 25, 2020.

- Despite, after above stated obstructions, the nation was yet again hit by the second wave of covid-19 pandemic and again all the activities in the real

estate sector were forced to stop. It is pertinent to mention, that considering the widespread of covid-19, firstly night curfew was imposed followed by weekend curfew and then complete curfew. That during the period from 12.04.2021 to 24.07.2021, each and every activity including the construction activity was banned in the state, this has been followed by the recent wave brought by the new covid variant in the country.

- That the respondent, despite such delay, earnestly fulfilled its obligation under the buyer's agreement and the construction of the project is going on as expeditiously as possible in the facts and circumstances of the case. The default committed by the complainants and various factors beyond the control of the respondent are the factors responsible for the delayed development of the project. The respondent cannot be penalized and held responsible for the default of its customers or due to force majeure circumstances. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

ix. That it is to be noted that as per clause 1.1, 1.2 of the memorandum of understanding and clause 6 and 33 of the agreement, it was categorically agreed between the parties that the super area of the unit was tentative and subject to change. The complainants vide the agreement categorically agreed that the respondent was duly authorized to make necessary alterations/amendments/modifications in the layout/building plans, designs, and specifications of the unit as the competent authority may deem fit. Hence, the respondent was duly authorized to change the area of the Unit

based on the alterations/changes in the layout plans. The relevant clauses are reiterated herein for the ready reference:

> *1.1. Developer agrees to allot the Unit to the Allottee, located on First Floor admeasuring the* ***aggregate tentative super area of 395.19 sq. ft. as per the tentative building plans (hereinafter referred to as the Said Unit') and Allottee agrees to accept the allotment of Unit. The consideration amount is subject to increase/decrease on basis of variation in calculation of actual super area of the Unit which shall be determined finally at the time of Completion /offer of Possession of the Unit.*** *The detailed terms and conditions of the allotment will be more particularly described in "Space Buyer's Agreement" for the Unit which shall be executed between the Parties subsequently. The Allottee hereby acknowledges and agrees to execute the same as and when required by the Company to do so.*
>
> ***1.2. It is hereby clarified to Allottee that super area of Unit as mentioned herein above is subject to modifications, and final confirmation of same shall be made upon completion of Complex / at the time of offer of possession of Unit.***
>
> *6.* ***The Allottee agrees and understands that the Sale Price of the Unit shall be calculated on the basis of Super Area (as defined and detailed out in Annexure-III) and that the Super Area as stated in this Agreement is tentative and subject to change****. The final Super Area of the Unit shall be confirmed by the "DEVELOPER/LLP" only after the construction is complete and the process for issuance of occupation certificate is initiated by the "DEVELOPER/LLP" with the competent authority(ies). The total Sale Price for the Said Unit shall be recalculated upon confirmation of the final Super Area. Any increase or reduction in the Super Area shall be payable or refundable as the case.*

x. That, it is *ex-facie* evident that the respondent was lawfully authorized to make the changes in super area till the actual offer of possession. Hence, the averments of the complainants regarding the change in area are mere allegations and should not be entertained.

xi. That the complainant has prayed for the relief of "assured returns", inter alia, on the basis of a memorandum of understanding, which is beyond the jurisdiction that the Authority has been dressed with. That from the bare perusal of the RERA Act, it is clear that the said Act provides for three kinds

of remedies in case of any dispute between a developer and allottee with respect to the development of the project as per the agreement for sale. That such remedies are provided under Section 18 of the RERA Act, 2016 for violation of any provision of the RERA Act, 2016. That the said remedies are of "refund" in case the allottee wants to withdraw from the project and the other being "interest for delay of every month" in case the allottee wants to continue in the project and the last one is for compensation for the loss occurred by the allottee. That it is relevant to mention here that nowhere in the said provision the Ld. Authority has been dressed with jurisdiction to grant "assured returns". It is additionally pertinent to note that the RERA Act also does not define a 'Memorandum of Understanding' on the basis of the which, relief has been sought by the complainant.

xii. That it is germane to note that the non-payment of assured return, as alleged by the complainant in his complaint is bad in law. It is pertinent to mention herein that the payment of assured return is not maintainable before the Ld. Authority upon enactment of the banning of unregulated deposits schemes Act, 2019 [BUDS Act] wherein, under section 7 thereof, the legislature, in its utmost wisdom, has noted that the 'competent authority' shall have the jurisdiction to deal with cases pertaining to the Act. That any direction for payment of assured return shall be tantamount to violation of the provisions of the BUDS Act. It is stated that the assured returns or assured rentals under the said agreement, clearly attracts the definition of "deposit" and falls under the ambit of "unregulated deposit

scheme". Thus, the respondent was barred under section 3 of BUDS Act from making any payment towards assured return in pursuance to an "Unregulated Deposit Scheme" and the competent authority to adjudicate such issue has to be notified under section 7 of the BUDS Act.

xiii. Assured return falls under the ambit of BUDS Act: That the respondent cannot pay "assured returns" to the complainant by any stretch of imagination in the view of the prevailing legal position. That on 21.02.2019, the central government passed an ordinance "banning of unregulated deposits, 2019", to stop the menace of unregulated deposits and payment of returns on such unregulated deposits.

xiv. That if the respondent continues paying the assured returns which is deposit as per the relevant provisions of the companies Act and BUDS Act, the same will be contravention of the provisions of the Acts and the respondent will be exposed to the penal provisions thereunder. That any orders or continuation of payment of assured return or any directions thereof will tantamount to contravention of the provisions of the BUDS Act.

xv. That it is most humbly submitted that the relief of assured returns cannot be entertained by this Authority.

xvi. That it is a matter of fact that the obligations of payment of the assured returns as per the MoU have been rightfully completed. That the MOU was replaced by the SBA on 20.04.2016 and thus all the rights and obligations under the MoU stands discharged. That thereafter, as a *bonafide* gesture and the payments of assured returns were continued for some extra time. That

the same was paid till November 2016. That the total amount of assured return paid is Rs. 11,20,817.

xvii. The complainants have failed in noting that the agreement (SBA) having been novated has superseded the MOU, as is also evident from Clause 83 of the SBA. In any circumstance, whatsoever, the Act does not speak of recognition of multiple agreements for sale of property.

xviii. It needs to be categorically noted that the SBA had superseded the MOU by novation and by virtue of the above-mentioned entire agreement clause 83 of the SBA. That a strict interpretation needs to be given to the same. In the presence of the entire agreement clause 83 of the SBA, the MoU can, under no circumstance be considered.

8. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submission made by the complainants.

E. Jurisdiction of the authority

9. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

10. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all

purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

11. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

12. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the relief sought by the complainants:

F.I Direct the respondent to allot another unit on the same sq. ft. i.e. 395.19 sq. ft. to the complainants without excessive overloading of the carpet area of the aforesaid unit, in case the respondent reduced the aforesaid unit No.118 from 395.19 sq. ft. to 341.09 sq. ft.

13. The complainants submitted that the respondent vide e-mail dated 01.04.2022, unilaterally reduced the super area of the said unit from 395.19 sq. ft. to 341.09 sq. ft., i.e., by 13.68%. Whereas the respondent on the other hand took plea that for the proposed changes it invited objections/suggestions from the complainants. The counsel of respondent further took plea of various clauses of MoU and space buyer's agreement such as clause J. (1.1), (1.3) and clause J, (3), of agreement wherein the allottee has undertaken to make payment towards 395.19 sq. ft. but, after payment the area was decreased to 341.04 sq. ft. Clause 33 of space buyer's agreement dated 20.04.2016 states *"That the allottee has seen and inspected the project site and also seen and accepted the plans, designs, specifications which are tentative and the allottee authorizes the "DEVELOPER/LLP" to effect suitable and necessary alterations/modifications in the layout plan/building plans, designs and specifications as the "DEVELOPER/LLP" may deem fit or as directed by any competent authority(ies). However, in case of any major alteration/modification resulting in more than 10% change in the Super area of the said unit to be paid by him/her/it and the allottee agrees to inform the "DEVELOPER/LLP" in writing his/her consent or objections to the changes within 15 (fifteen) days from the date of such notice failing which the allottee shall be deemed to have given his/her/its full consent to all the alternations/modifications."* In the present matter, as per the MoU clause 1.1 and space buyer agreement clause 6 and 33 w.r.t. the area allotted was tentative and subject to change. Further the respondent has intimated the

complainant vide email dated 01.04.2022 regarding final super area of unit is 341.09 sq. ft. and the final adjustments of the unit price based on the actual area will be done at the time of possession.

14. The Authority observes that the complainant was originally allotted unit no. 118 on first floor admeasuring 395.19 sq. ft., whereas the area of allotted unit was reduced to 341.09 sq. ft. i.e. 13.68%. Whereas, as per clause 1.3 of agreement the allottee has paid for 395.19 sq. ft. of super area. As per respondent's intimation email dated 01.04.2022, regarding final super area of unit i.e., 341.09 sq. ft. and the final adjustments of the unit price based on the actual area will be done at the time of possession. Hence, the Authority directs the respondent to refund the amount for decreased area i.e., 13.68% as per agreed rate mentioned in the space buyer's agreement.

F.II Direct the respondent to pay the assured return of Rs.41,178.798/- per month after deducting TDS of Rs.4,117.789/- i.e. balance Rs.37,061/- on amount paid to the complainants from February 2017 to till the offer of the possession of the unit with interest for every month of delay at prevailing rate of interest on the unpaid amount.

15. **Assured return:** While filing the claim petition besides delayed possession charges of the allotted unit as per space buyer's agreement dated 20.04.2016, the claimant has also sought assured returns on monthly basis as per clause 3.1 of MOU at the rate of Rs.104.20/- per sq. ft. of super area per month till the notice for offer of possession is issued by the developer. It is pleaded by the claimant that the respondent has not complied with the terms and conditions of the agreement. Though for till November 2016 the amount of assured returns was paid but later on, the respondent refused to pay the

same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). citing earlier decision of the authority (*Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd., complaint no 141 of 2018*) whereby relief of assured return was declined by the authority. The authority has rejected the aforesaid objections raised by the respondent in *CR/8001/2022 titled as Gaurav Kaushik and anr. Vs. Vatika Ltd.* wherein the authority on the basis of new facts and law and the pronouncements made by the apex court of the land and it was held that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and the Act of 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per section 2(4)(l)(iii) of the Act of 2019. Thus, the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above.

16. Complainant is seeking unpaid assured return on monthly basis as per Article 3 of memorandum understanding and respondent has refused to pay the assured return by taking plea of the Banning of Unregulated Deposit Schemes Act, 2019 and that the said MoU dated 12.12.2013 has been suppressed by the space buyer's agreement dated 20.04.2016.

17. As per the documents available on record and submissions made by the parties , the authority observes that the as per the severability clause of the said MoU, which is reproduced below, the said MoU will continue binding on both the parties:

> *"each part of this MoU is severable from the others and in the event that any part of this deed becomes unenforceable for any reason whatsoever such part shall be deemed to be amended or deleted in so far as reasonably in consistent with the purpose of this deed and and to extent necessary to confront to the applicable laws and the remaining deed shall continue to be binding. In the event that any part of this MoU becomes unenforceable, the parties shall endeavour to enter into and execute such fresh terms as are in conformity with the laws and which embody the original intention of the parties as reflected from the unenforceable clauses."*

18. As per the above severability clause, the said MoU will continue binding on both the parties. Moreover, the respondent has made payments of assured return till 30.11.2016, it is evident from the bank statement of complainant. Therefore, even after execution of buyer's agreement dated 20.04.2016, respondent has paid assured return in terms of Article 3 of MoU dated 12.12.2013, which shows that respondent has also establish the said MoU and the same is binding on him and even after execution of buyer's agreement.

19. The money was taken by the builder as deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to

approach the authority for redressal of his grievances by way of filing a complaint.

20. It is not disputed that the respondent is a real estate developer, and it had not obtained registration under the Act of 2016 for the project in question. However, the project in which the advance has been received by the developer from the allottee is an ongoing project as per section 3(1) of the Act of 2016 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainants besides initiating penal proceedings. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on.

21. The builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement defines the builder/buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale.

F.III Direct the respondent to handover the possession of the aforesaid unit to the complainants within 3 months.

22. The respondent shall handover the physical possession of the allotted unit of the complainant within a period of 60 days after obtaining part competition/competition certificate.

F.IV Direct the respondent to pay delay possession charges Interest for every month of delay at prevailing rate of interest from the due date of possession i.e. 20th April 2019 till the date of actual handing over of complete and valid physical possession of the unit.

23. **Delay Possession Charge and Possession**: In the present complaint, the complainants intend to continue with the project and are seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which reads as under:

> ***"Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
> .....
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

24. The space buyer agreement dated 20.04.2016 was executed between the parties. As per article 38 of the space buyer's agreement provides for handing over of possession and is reproduced below:

> *"38. The "DEVELOPER /LLP" will, based on its present plans and estimates, contemplates to offer possession of possession of said unit to Allottee(s) within 36 months (refer cl. 37 above) of signing of this Agreement or within 36 months from the date of start of construction of said building whichever is later with the grace period of 3 months subject to force majeure events or Government action/inaction. If the completion of the said building is delayed by reason slow down, strike of due to a dispute with the construction agency employed by the "DEVELOPER/LLP" lock out or departmental delay or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of God or any other reason beyond control of the "DEVELOPER/LLP" shall be entitled to extension of time for delivery of possession of the said premises....."*

25. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter.

The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by him in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over of possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position to draft such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

26. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to handover the possession of the said unit within 36 months from the date of singing the agreement or date of start of construction whichever is later and has sought further extension of a period of 3 months (after the expiry of the said 36 months) subject to force majeure events or governmental action /inaction. The due date of possession was in the year 2019 and any situation or circumstances which could have a reason for not carrying out the construction activities in the project prior to this date due are allowing to be taken into consideration. While considering whether the situations or circumstances contested by respondent in its reply were and hence, the respondent is in fact beyond the control of the

respondent is entitled to force majeure, the authority takes into consideration all the pleas taken by the respondent to plead the force majeure condition happened before 20.04.2019. Accordingly, authority allows 3 months of grace period.

27. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."*

28. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 09.07.2024 is 9%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11%.

29. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the

promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

30. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 11% by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.

31. The complainant had booked a unit bearing no. F-118, admeasuring 395.19 sq. ft., the said area was revised to 341.04 sq. ft. As per space buyer's agreement dated 20.04.2016 the possession of the said unit was to be handed over within 36 months of signing of the space buyer's agreement or within 36 months from the date of construction of the said building whichever is later with the grace period of 3 months subject to force majeure events. Thus, the due date of possession comes out to be 20.07.2019 (36 months from date of agreement as date of start of construction is not available plus 3 months of grace period).

32. It is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement to hand over the possession within the due date i.e., 20.07.2019 and further to fulfil its obligations of payment of Assured return till offer of possession, after November, 2016 as per MoU Article 3. Accordingly, the non-compliance of the mandate contained in Section 11(4)(a) read with Section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at rate of the prescribed interest @ 11% p.a. w.e.f. 16.03.2021 till the actual handing over of possession or valid offer of possession plus 2 months, whichever is earlier as per provisions of Section 18(1) of the Act read with Rule 15 of the Rules, ibid.

33. Further, as per Section 17(1) of the Act of 2016, the respondent is obligated to handover physical possession of the subject unit to the complainant. Therefore, the respondent shall handover the possession of the allotted unit as per specification of the buyer's agreement entered into between the parties, after receiving occupation certificate from the competent Authority.

34. The authority further observes that now, the proposition before it is as to whether the allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

35. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottees on account of provisions in the MoU. The assured return in this case is payable as per "Article 3 of

memorandum of understanding dated 12.12.2023. The rate at which assured return has been committed by the promoter is, till 18 months from the date of this MoU, an assured return at the rate of Rs.55.45/- per sq. ft. of the super area of premises per month and after payment of balance premium as per schedule-1 till the notice for offer of possession is issued, the developer shall pay to the allottee an assured return at the rate of Rs. 104.20/- per sq. ft. of super area of premises per month". The rate at which assured return has been committed by the promoter is Rs. 104.20/- per sq. ft. of super area which is more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the assured return is much higher i.e., much better i.e. the assured return in this case is payable Rs.41,178/- whereas the delayed possession charges are payable at the amount of Rs.36,757/- per month. By way of assured return, the promoter has assured the allottee that he will be entitled for this specific amount till offer of possession. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns are payable till offer of possession. The purpose of delayed possession charges after due date of possession is over and payment of assured return after due date of possession is over as the same to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date and in return, he is paid either the assured return or delayed possession charges whichever is higher.

36. In the present complaint, the due date of possession in the present matter as per possession clause provided in the space buyer's agreement dated 20.04.2016 comes out to be 20.07.2019. There has been delay of many year to provide the possession of the unit. Admittedly, occupation certificate for that block has not been received by the promoter till this date. The authority is of the view that the construction cannot be deemed to complete until the occupation certificate is obtained from the concerned authority by the respondent promoter for the said project.

37. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges, allottee is entitled under section 18 and is payable even after due date of possession is over till offer of possession then after due date of possession is over, the allottee shall be entitled only assured return or delayed possession charges whichever is higher without prejudice to any other remedy including compensation. The authority directs the respondent/promoter to pay assured return from the date the payment of assured return was stopped till offer of possession and declines to offer any amount on account of delayed possession charges as his interest has been protected by granting assured returns till the offer of possession of the allotted unit.

F.V To direct the respondent to pay litigation cost.

38. **Litigation Expenses:** The complainant is also seeking relief w.r.t. Litigation. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate

entitlement/rights which the allottee can claim. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP & Ors.*** (supra) has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72.

39. In the present case, the authority (Shri. Arun Kumar, Hon'ble Chairperson, Shri. Vijay Kumar Goyal, Member & Shri. Sanjeev Kumar Arora, Member) heard the complaint and disposed of on 09.07.2024, during the preparation of order of the above matter, one of the member Shri. Sanjeev Kumar Arora got retired and has been discharged from his duties from the Authority. Hence, rest of the presiding officers of the Authority have signed the said order.

G. Directions of the authority

40. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act:

i. The respondent is directed to handover the possession of the unit allotted in space buyer's agreement and give the possession of the same

as per agreed terms of space buyer's agreement within 30 days after obtaining occupation certificate.

ii. The respondent is directed to pay an arrears of assured return being higher than the DPC at the rate of Rs.104.20/- per sq. ft. of the super area of premises per month from the date of payment of balance premium as per schedule-1 till the notice for offer of possession is issued as per Article 3.1 of the MoU.

iii. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @ 9% p.a. till the date of actual realization.

iv. The respondent shall not charge anything from the complainants which is not the part of the space buyer's agreement.

41. Complaints stand disposed of.

42. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Arun Kumar)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Date: 09.07.2024